86-639

No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

AMBROSE DAIGLE,

Petitioner,

v.

GULF STATES UTILITY COMPANY;
IBEW LOCAL 2286; *et al.*,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

I.

Should the period of time taken by the National Labor Relations Board in determining whether or not to issue a complaint toll the limitations period in which to file suit in Federal District Court?

II.

Does the retroactive application of a statute of limitations, which is a break with past precedents, constitute a denial of due process if an individual's cause of action is cut off without notice or recourse?

III.

Is a conspiracy between the employer and the union to deny an individual the right to work a violation of that individual's civil rights?

CERTIFICATE OF INTERESTED PARTIES

The following is a list of all parties to the proceeding in the United States Court of Appeals for the Fifth Circuit:

(1) Ambrose Daigle, Petitioner

(2) Gulf States Utilities Company, Respondent

(3) Local Union Number 2286, Respondent

(4) International Brotherhood of Electrical Workers, Respondent

(5) Larry Wenzell, Respondent

(6) Jimmy Smith, Respondent

(7) Texas Employment Commission, Respondent

(8) Lester R. Buzbee, III, attorney for Ambrose Daigle

(9) Darrell McAlexander, attorney for Ambrose Daigle

(10) James W. Hambright, attorney for Gulf States Utilities Company, Larry Wenzell and Jimmy Smith

(11) Robert J. Hambright, attorney for Gulf States Utilities Company

(12) William E. Heaner, Jr., attorney for Gulf States Utilities Company

(13) Martin Dies, attorney for IBEW

(14) Susan F. Eley, attorney for Texas Employment Commission

INDEX

	Page
QUESTIONS PRESENTED	i
LIST OF PARTIES	ii
TABLE OF CASES	iv
OPINIONS BELOW	1
JURISDICTION	2
STATUTES INVOLVED	2
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE WRIT	4
CONCLUSION	9
APPENDIX A	
Opinion of United States Court of Appeals For The Fifth Circuit of July 18, 1986	1a
Judgment of Order of Dismissal, United States District Court for the Eastern District, of March 18, 1985	13a
Journal Entry of Judgment of Memorandum Opinion, United States District Court for the Eastern District, of March 18, 1985	15a
APPENDIX B	
42 USCA 1981	28a
42 USCA 1985 (2) (3)	28a
29 USCA 157	29a
29 USCA 160	30a
Vernon's Ann. Civ. St. Art 5154d Section 2	31a
Vernon's Ann. Civ. St. Art 5207a Section 1	31a
Vernon's Ann. Civ. St. Art 5526 Section 4	31a
Vernon's Ann. Civ. St. Art 5527 Section 1	31a
Vernon's Ann. Civ. St. Art 5529	32a

TABLE OF CASES

Page

Auto Workers v. Hoosier Corp., 383 U.S. 696, 86 S.Ct. 1107, 16 L.Ed.2d 192 (1966) 5, 7

Chevron Oil Company v. Huson, 404 U.S. 97, 92 S.Ct. 349, 30 L.Ed.2d 296 (1976) 6

DelCostello v. International Brotherhood of Teamsters, 462 U.S. 151, 103 S.Ct. 2281, 76 L.Ed.2d 476 (1983) ..... *passim*

Edwards v. Sea-Land Service, Inc., 720 F.2d 857 (CA 5th 1983) 6

Griffin v. Breckenridge, 403 U.S. 88, 91 S.Ct. 1790, 20 L.Ed.2d 338 (1971) 8

Hensley v. United Transport, Inc., 346 F.Supp. 1108 (N.D. Tex. 1972) 5

Mosler Steel Co. v. NLRB, 568 F.2d 436 (C.A. 5, Tex. 1978) 7

United Broth. of Carpenters & Joiners v. Scott, 103 S.Ct. 3352 (1983) 8

STATUTES

29 USCA, Section 157, 160(b) 2, 4

42 USCA, Sections 1981 and 1985(2) and (3) ..... *passim*

V.A.T.S.

Art. 5154d, Sec. 2 ..... 2, 8, 31a

Art. 5207a, Sec. 1 ..... 2, 8, 31a

Art. 5526 (now V.T.C.A., Civil Practice & Remedies Code, Sec. 16.003 ..... 5, 31a

Art. 5527 (now V.T.C.A., Civil Practice & Remedies Code, Sec. 16.004 ..... 5, 31a

Art. 5529 (now V.T.C.A., Civil Practice & Remedies Code, Sec. 16.051 ..... 5-6, 32a

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AMBROSE DAIGLE,

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GULF STATES UTILITY COMPANY;
IBEW LOCAL 2286; *et al.*,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

To The Honorable, The Chief Justice and Associate Justices of the Supreme Court of the United States:

Ambrose Daigle, the Petitioner, prays that a Writ of Certiorari issue to review the Judgment of the United States Court of Appeals for the Fifth Circuit entered in this matter on July 18, 1986.

OPINIONS BELOW

The opinions of the United States Court of Appeals for the Fifth Circuit is reported at 794 F.2d 974 and is printed in Appendix A, *infra*, page 1a. The Judgment of the United States District Court for the Eastern District of Texas, Beaumont Division, is printed in Appendix A, *infra*, page 13a.

JURISDICTION

The Judgment of the United States Court of Appeals for the Fifth Circuit (Appendix A, *infra*, page 1a) was entered on July 18, 1986. The Jurisdiction of the Supreme Court is involved pursuant to 28 USCA Section 1254(1).

STATUTES INVOLVED

42 USCA 1981 Equal rights under the law

42 USCA 1985(2) Conspiracy to interfere with Civil Rights

(3) Depriving persons of rights or privileges

29 USCA 157 Right of employees as to organization, collective bargaining, etc.

29 USCA 160 Prevention of unfair labor practices—Powers of Board generally

Vernon's Ann. Civ. St. Art 5207a Section 1 Right to bargain freely not to be denied, membership in labor union

Vernon's Ann. Civ. St. Art 5154d Section 2 Picketing

STATEMENT OF THE CASE

This is a wrongful discharge action brought by AMBROSE DAIGLE for breach of contract. Also, petitioner claims that the Respondents conspired to deny him his right to work in violation of V.A.T.S. 5702; Title 42 USCA Section(s) 1981 and 1985, and 29 USCA, Section 157, et seq.

THE EVIDENCE:

On October 12, 1982, Petitioner was discharged after 31½ years from Gulf States Utilities Company. On October 17, 1982, though not a member, Petitioner requested that the INTERNATIONAL BROTHERHOOD OF ELEC-

TRICAL WORKERS (hereinafter referred to as IBEW), Local 2286, file a grievance on his behalf. On or about October 29, 1982, Petitioner filed his "charge" with the National Labor Relations Board (hereinafter referred to as NLRB).

On November 19, 1982, Respondent IBEW Local 2286, refused to file a grievance on behalf of Petitioner. On May 23, 1983, the NLRB, based upon Affidavits provided by Respondents, refused to issue a "Complaint". On June 8, 1983, the Honorable Supreme Court reported its decision in *DelCostello v. International Brotherhood of Teamsters*, 462 U.S. 151, 103 S. Ct. 2281, 76 L.Ed2d 476 (1983) making applicable the six (6) month Statute of Limitations to claims filed under 29 U.S.C. Section 185.

Petitioner filed his District Court suit on August 8, 1983.

THE RULINGS BELOW:

The District Court granted Respondents F.R.C.P. Rule 12 Motion and dismissed Petitioner's complaint. This dismissal was carried forward to the United States Court of Appeals for the Fifth Circuit.

The Court of Appeals held that the claims against the Union were barred because the suit was filed more than six (6) months after notice from the IBEW, and that it would not represent Petitioner by filing a grievance on his behalf. Further, if the Collective Bargaining Agreement was the "exclusive and final" remedy for breach of contract, then the six (6) month limitation would apply to the claim against the company. The court cited as authority *DelCostello (supra)* as controlling.

The Court of Appeals also held that Petitioner failed to state a cause of action under the provisions of Title 42 USCA 1985 and 1981, as there was no "racial or perhaps otherwise class-based, invidiously discriminatory

animus behind the Conspirator's action". Additionally, the Court held that the NLRB is not a part of the "Federal Court system" therefore an individual's civil rights are not protected pursuant to 1985 (2).

REASONS FOR GRANTING THE WRIT

I.

Certiorari should be granted to dispose of the requirement of filing complaints in labor related actions with both the NLRB and the Federal District Court simultaneously.

The issue here is whether the period of time between filing a charge and the issuance or denial of a complaint by the NLRB should toll the six (6) months Statute of Limitations as established in *DelCostello (supra)*.

As a result of the ruling in *DelCostello (supra)* the Statute of Limitation in a "labor related" action is six (6) months for both the filing of a charge with the NLRB and the filing of a civil suit in the Federal District Court. As the NLRB, pursuant to 29 USCA, Section 160(b), can refuse to issue a complaint, a party must file an identical action in the Federal District Court, the same action while awaiting the decision of the NLRB. Failure to make this multiple filing now results in the same situation as the case at bar. An individual desires to have his cause heard by the NLRB, but, the time that the NLRB takes in determining whether or not to issue a complaint may exceed six months. This constitutes, at best, a procedural trap guaranteed to ensnare the employee seeking to vindicate his rights without benefit of council, through his reliance on the very method which Congress enacted to protect his right to file and air a charge without the necessity of seeking recourse in the Court.

It is only the period of time pending the NLRB's decisions whether or not to issue a complaint, normally six

(6) to eight (8) months including appellate time, which should toll the six (6) month limitation for filing in Federal District Court. To imbed a policy requiring multiple filings of the same action in different forums, is not only burdensome (costly) to the litigants, but constitutes a waste of valuable court time and space, and unleashes the probability of collateral estoppel being used to create havoc in parallel litigation.

II.

Certiorari should be granted in order to determine whether the retroactive application of Statutes of Limitation, constituting a breach with past precedent, is a denial of due process.

The application, retroactively, of the six months Statute of Limitations as set forth in *DelCostello (supra)* denies Petitioner due process in that no forum is, or was ever available for a hearing on the merits.

DelCostello (supra) was decided on June 8, 1983, and Petitioner filed this suit on August 8, 1983, immediately on discovery of the change in the prior law. Petitioner in seeking his relief by attempting to utilize the administrative procedures of the NLRB, relied on cases decided by this Court, *Auto Workers v. Hoosier Corp.*, 383 U.S. 696, 86 S.Ct. 1107, 16 L.Ed.2d 192 (1966) and also upon previous rulings in the Fifth Circuit as to applicability of Tex. Rev. Civ. Stat. Ann., Art. 5527 (Vernon's, 1982), the four (4) year statute of limitation on contracts. Also see: *Hensley v. United Transport, Inc.*, 346 F.Supp. 1108 (N.D. Tex. 1972). There have been several Texas Court decisions applying Art. 5526 (now V.T.C.A., Civil Practice & Remedies Code, Sec. 16.003), two (2) year limitation for breach of oral employment contract; Art. 5527 (now V.T.C.A., Civil Practice & Remedies Code, Sec. 16.004), four (4) year limitation for breach of written employment contracts; and, Art. 5529 (now V.T.C.A., Civil Practice & Remedies Code, Sec.

16.051), four (4) year limitation for suit on Employment Contract.

By applying *DelCostello*, to the facts of this cause, there is a clear break with past precedent, as contemplated by *Chevron Oil Company v. Huson*, 404 U.S. 97, 92 S.Ct. 349, 30 L.Ed.2d 296 (1976). Additionally, the Fifth Circuit had previously ruled that an employer's action against a union for fair representation was a two (2) year limitation for tort actions. Though Petitioner is suing for Breach of Contract, he relied on the fact that the shortest period of limitations would be two (2) years. *Edwards v. Sea-Land Service, Inc.*, 720 F.2d 857 P861 (CA 5th 1983).

In *Edwards (supra)*, the Fifth Circuit discussed the three purposes under *DelCostello;* first was the need for uniformity; second was the short period for vacation of arbitration awards; and third, the rapid final resolution of labor disputes. The conclusion was, "—the proper balance between the national interest in stable bargaining relationships and finality of private settlement, and an employer's interest in setting aside what he views as an unjust settlement under the collective bargaining system". On the first count, the establishment of uniformity is a sound basis; the second and third points do not apply in this case. Suits on contracts for breach, rather than interpretation of same, have in all jurisdictions a sufficient limitation period provided by specific statute. *In cases such as the one at bar, the retrospective application will in effect undermine the goal of submitting such a claim to the NLRB and/or to arbitration.* (emph. added)

In the case at bar what are the *Equities of Retroactive Applications?* (emph. added) Petitioner has never had any procedural due process. There was no arbitration, nor any grievance filed, and the NLRB refused to issue a complaint. Petitioner, should this limitation be applied restrospectively, will be deprived of any remedy, or

even a forum in which to present his side of the conflict. In all of the cases cited each plaintiff had an opportunity to at least present his side through arbitration or at a hearing before the NLRB. Petitioner, in relying on established precedent not only in the Fifth Circuit, but on precedent of the Supreme Court *(Hoosier, supra)*, is now subjected to a harsh and unjust deprivation of a remedy or even a forum in which to bring his claim of injury. Petitioner requested a grievance be filed, sought to invoke the jurisdiction of the NLRB, pursued all of his appeals diligently and filed this suit expeditiously. There is no damage which the Respondents can allege, other than that of a loss on the merits, by the prospective application of *DelCostello (supra)* in this case. Within 5 days of his discharge Petitioner requested assistance of the Union and within 90 days filed his charge with the NLRB. At the time of discharge he informed Gulf States Utilities that he would seek assistance of the IBEW to file a grievance and would file a NLRB charge. Since the thrust of labor law is not the protection of the Union, or the employer, but rather the protection of the employee, a decision that would operate to the disadvantage of the employee is, at minimum, to be avoided. *Mosler Steel Co. v. NLRB*, 568 F.2d 436 (C.A. 5, Tex. 1978). Numerous depositions and other discovery have been taken, the case is ready for trial. There is no question that the retrospective application of *DelCostello* to Petitioner's suit would be inequitable.

III.

Certiorari should be granted to establish whether or not any labor related conspiracy is or is not subject to violations of civil rights as set forth in Title 42 USCA Sec. 1981 et seq.

The issue in this case is whether the employer and the IBEW, together with a group of indivduals, can conspire to deny an individual his right to work.

The lower court held that the case of *United Broth. of Carpenters & Joiners v. Scott*, 103 S.Ct. 3352 (1983), was controlling and that as such Petitioner failed to state a cause of action. This is not a case involving attempted union organization or economic animus as set out in *Scott (supra)*. Petitioner alleged a conspiracy between his employer, the union and several individuals to deny him his right to work. Petitioner went further and asserted that these same entities and individuals conspired and filed false affidavits and gave false testimony to the National Labor Relations Board and to the Texas Employment Commission with the deliberate intent to obstruct justice and deny him equal protection under the law. Petitioner met all the elements set forth in *Griffin v. Breckenridge*, 403 U.S. 88, 102-103, 91 S.Ct. 1790, 20 L.Ed.2d 338 (1971).

Texas, pursuant to Vernon's Ann. Civ. St., Art. 5207a, Sec. 1, guarantees an individual the right to work. Further, it is statutorily prohibited to, "—hinder, obstruct, or intimidate, another in the exercise of his lawful right to work, —". Vernon's Ann. Civ. St., Art. 5154d, Sec. 2. There is no campaign here to organize, as the union was already the bargaining agent and had been for many years at Gulf States Utilities, nor is it unionism or non-unionism that is the basis of this claim. The basis is the right to work. It may be judicially noticed that the Port Arthur/Beaumont, Texas area is a "hot bed" of union radicalism. (emp. added) Petitioner was one of several individuals employed by Gulf States Utilities who did not belong to the local union. Additionally, Petitioner believed in exercising his right to work even to the point of crossing union picket lines when necessary. Due to his belief in and practice of his statutorily guaranteed right to work, Petitioner became a member of a minority class in this area of the United States.

The conspiracy herein was directed to deny to that class of individuals to which Petitioner belonged, the equal

enjoyment of rights secured by law to all citizens, the right to work. In furtherance of this conspiracy, Respondents' giving of false affidavits and testimony to both the NLRB and the Texas Employment Commission was an obstruction of the due course of justice. Such conduct is specifically prohibited pursuant to 42 USCA, Sec. 1981 and 1985(2) and (3).

CONCLUSION

WHEREFORE, Petitioner respectfully prays that a writ of certiorari be granted.

Respectfully submitted,

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APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 85-2345

AMBROSE DAIGLE,
Plaintiff-Appellant,

v.

GULF STATE UTILITIES CO., LOCAL
UNION NUMBER 2286, ET AL.,
Defendants-Appellees.

Filed July 18, 1986

Before: Jerre S. Williams, Will Garwood and
Edith H. Jones, Circuit Judges.

Opinion by Judge Jerre S. Williams

Appeal from the United States District Court
for the Eastern District of Texas
Earl S. Hines, Magistrate, Presiding

OPINION

JERRE S. WILLIAMS, Circuit Judge:

Ambrose Daigle filed various claims relating to his termination from his employment. He sued his employer for breach of contract under § 301 of the Labor-Management Relations Act of 1947 (LMRA) and his union for breach of the duty of fair representation. In addition, he complained that his employer, his union, and certain persons conspired against him in violation of 42 U.S.C. §§ 1981 and 1985. Finally, he brought a state law claim for unemployment compensation benefits. We affirm the trial court's decision dismissing the civil rights conspiracy claims, the state law claim, and the fair representation claim, but reverse for further proceedings the dismissal of the § 301 claim against the employer.

I. FACTS

The appellant, Ambrose Daigle, was discharged on October 12, 1982, from Gulf State Utilities Company (GSU) for violating a company work rule. At the time of his discharge, appellant was a member of a collective bargaining unit of GSU employees who were represented by the International Brotherhood of Electrical Workers, Local 2286 (IBEW). He applied to the IBEW and the National Labor Relations Board (NLRB) for assistance. After an investigation, IBEW decided not to file a grievance on the appellant's behalf and notified him of this decision by a letter dated November 19, 1982. On November 17, 1982, the NLRB notified the appellant that it refused to issue a complaint, and the final appeal from this decision was denied on May 23, 1983.

The appellant applied to the Texas Employment Commission (TEC) for unemployment benefits. The TEC ruled that appellant was ineligible for benefits under Tex. Rev. Civ. Stat. Ann. art. 5221b-3(b) because he was discharged for misconduct.

The appellant filed suit on August 8, 1983. His complaint consisted of two counts. In Count One, he alleged (1) GSU breached the collective bargaining agreement

and IBEW breached its implied statutory duty of fair representation; and (2) GSU, IBEW, Larry Wenzel and Jimmy Smith (appellant's supervisors) engaged in a conspiracy to deprive him of his right to work pursuant Tex. Rev. Civ. Stat. Ann. art. § 5207a and also in violation of 42 U.SC. §§ 1981 and 1985 because appellant was "not a member of [IBEW] and in 1975 [he] continued to work while [IBEW] was on strike against [GSU]". Besides allegedly conspiring to have the appellant fired, the defendants also allegedly submitted false affidavits and testimony to the NLRB and TEC in furtherance of the conspiracy. In essence, the appellant alleges his discharge and his failure to obtain relief from the NLRB, TEC, and union occurred because he was a "scab". In Count Two of his complaint, appellant sought judicial review under Tex. Rev. Civ. Stat. Ann. art. 5221b-4(i) of the TEC's decision denying his claim for unemployment benefits.

All defendants under both counts of the complaint filed motions to dismiss. Defendants GSU and IBEW based their motion on the pleadings under Fed. R. Civ. P. 12(c). Defendant TEC based its motion on lack of subject matter jurisdiction under Fed. R. Civ. P. 12(b)(1). At the hearing on the motions to dismiss the parties stipulated that "racial discrimination plays no part in this case" and that IBEW's decision not to file a grievance was communicated to the appellant on November 19, 1982, more than six months before he filed suit. Both counts of the appellant's claim as against all appellees were dismissed. The magistrate [1] dismissed the breach of contract and fair representation claims as time-barred under *DelCostello v. Teamsters*, 462 U.S. 151, 103 S.Ct. 2281, 76 L.Ed.2d 476 (1983). The civil rights conspiracy claims were dismissed on the ground that a "scab" is not a protected class under §§ 1981 and 1985. The magistrate

[1] The parties consented to a magistrate presiding over their case. 28 U.S.C. § 636(c).

dismissed the unemployment benefit suit as barred by Eleventh Amendment state immunity from suit in federal court, and alternatively held that it would be inappropriate to hear the case when the federal claims has been dismissed. Daigle appeals.

II. § 301 BREACH OF CONTRACT AND FAIR REPRESENTATION CLAIMS

We must characterize the appellant's breach of contract and duty of fair representation claims to determine the applicable statute of limitations. GSU and IBEW argue that appellant's suit is a classic hybrid § 301 claim of employer breach of contract and union breach of the duty of fair representation. As such, they urge, it is barred by the well-established National Labor Relations Act's six-month statute of limitations. Appellant argues that his claim is a straightforward breach of contract claim governed by the Texas statute of limitations of four years for contract actions. *Hoosier Cardinal Corp. v. Auto Workers*, 383 U.S. 696, 86 S.Ct. 1107, 16 L.Ed.2d 192 (1966).

A § 301 breach of contract and fair representation suit comprises two distinct causes of action, one against the employer, and the other against the union. Section 301 of the LMRA, 29 U.S.C. § 185, provides an employee with a federal cause of action against his employer for breach of the collective bargaining agreement. The suit against the union for breach of the duty of fair representation is implied under the scheme of the National Labor Relations Act. *DelCostello*, 462 U.S. at 165, 103 S.Ct. at 2290. The two causes of action are "inextricably interdependent", and have come to be known as a hybrid § 301/duty of fair representation suit. *United Parcel Service, Inc. v. Mitchell*, 451 U.S. 56, 101 S.Ct. 1559, 67 L.Ed.2d 732 (1981). The interdependency arises from the nature of the collective bargaining agreement. If the arbitration and grievance procedure is the exclusive and final rem-

edy for breach of the collective bargaining agreement, the employee may not sue his employer under § 301 until he has exhausted the procedure, *Republic Steel Corp. v. Maddox*, 379 U.S. 650, 85 S.Ct. 614, 13 L.Ed.2d 580 (1965). Further, he is bound by the procedure's result unless he proves the union breached its duty of fair representation. *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554, 96 S.Ct. 1048, 47 L.Ed.2d 231 (1976). Thus, the "indispensable predicate" for a § 301 action in this situation is a fair representation claim against the union. *Mitchell*, 451 U.S. at 62, 101 S.Ct. at 1564. As the Supreme Court stated in *DelCostello*:

> To prevail against either the company or the Union, . . . [employee-plaintiffs] must not only show that their discharge was contrary to the contract but must also carry the burden of demonstrating breach of duty by the Union. The employee may, if he chooses, sue one defendant and not the other, but the case he must prove is the same whether he sues one, the other, or both.

462 U.S. at 166, 103 S.Ct. at 2291 (citations omitted). In essence the hybrid § 301/fair representation suit is brought "in order to set aside a final and binding determination of a grievance, arrived at through the collectively bargained method of resolving the grievance. It is, therefore, a direct challenge to the private settlement of disputes under the collective bargaining agreement." *Mitchell*, 451 U.S. at 67, 101 S.Ct. at 1566 (Stewart, J., concurring); *DelCostello*, 462 U.S. at 166, 103 S.Ct. at 2291.

On the other hand, if the collective bargaining agreement does not provide that the grievance and arbitration procedure is the exclusive and final remedy for breach of contract claims, the employee may sue his employer in federal court under § 301, *Vaca v. Sipes*, 386 U.S. 171, 183, 87 S.Ct. 903, 913, 17 L.Ed.2d 842 (1967), and the state statute of limitations applicable to contract

breaches applies. *Hoosier Cardinal Corp. v. Auto Workers*, 383 U.S. at 704, 86 S.Ct. at 1113; *Smith v. Kerrville Bus Co.*, 748 F.2d 1049 (5th Cir. 1984). In such an instance, a fair representation suit against the union would still be governed by the *DelCostello* six-month statute of limitations. *See DelCostello*, 462 U.S. at 169, 103 S.Ct. at 2292 (rejecting state limitations period for legal malpractice for fair representation claim against the union because "application of a longer malpractice statute would preclude the relatively rapid solution of labor disputes favored by federal law."); *accord Mitchell*, 451 U.S. at 64, 101 S.Ct. at 1564.

Consequently, appellant's claim against the union is barred in any event by the six month statute of limitations since he filed suit more than six months after the union notified him of its decision not to file a grievance, the date the limitations period began to run. *Hersh v. Allen Products Co., Inc.*, 789 F.2d 230, 232 (3d Cir. 1986); *see, Metz v. Tootsie Roll Industries*, 715 F.2d 299, 304 (7th Cir. 1983), *cert. denied*, 464 U.S. 1070, 104 S.Ct. 976, 79 L.Ed.2d 214 (1984), *citing, Hungerford v. United States*, 307 F.2d 99, 102 (9th Cir. 1962). We are unable to dispose of appellant's § 301 claim, however, because the record before us does not include the collective bargaining agreement and nothing in the record tells us if it requires an aggrieved employee first to seek remedy through the grievance and arbitration procedure. We must therefore remand for the trial court to apply the parties' collective bargaining agreement. If the contract contains the typical provision that aggrieved parties must go through the grievance and arbitration procedures and the procedures' resolution is final and binding on the parties, appellant's suit against both employer and union is barred. For as we pointed out above, appellant's § 301 suit would then hinge on the claim that the union breached its duty of fair representation, a claim the appellant is barred from bringing. Thus, he cannot bring a separate breach of contract suit with a separate

statute of limitations applicable. *DelCostello*, 462 U.S. at 159 n.12, 103 S.Ct. 2287 n.12. Only if the arbitration and grievance procedures in the contract are alternative procedures, leaving the aggrieved employee and the exclusive bargaining representative free to use or not use them as they wish does the state statute of limitations for breach of contract apply to appellant's § 301 suit.

III. CIVIL RIGHTS CLAIMS

A. *Section 1985(3) Claim*

Section 1985(3) prohibits private conspiracies to deprive persons of equal protection of the laws.[2] The issue is whether the appellant satisfied § 1985(3)'s requirement that there must be "some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action." *Griffin v. Breckenridge*, 403 U.S. 88, 102, 91 S.Ct. 1790, 1798, 29 L.Ed.2d 338 (1971). The magistrate reasoned that the appellant's claim under § 1985(3) was foreclosed by *United Brotherhood of Carpenters & Joiners v. Scott*, 463 U.S. 825, 103 S.Ct. 3352, 77 L.Ed.2d 1049 (1983). In *Scott*, A. A. Cross Construction Co., Inc. (Cross), a business that hired workers without regard to union membership, operated in a self-professed union town. The local union employees resented Cross's hiring practices. The friction between the local union workers and the employees of the company culminated in a brutal attack of Cross's employees at the company's worksite. Cross and two employees sued the various unions whose members were allegedly responsible for the attack under § 1985(3). The

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[2] Section 1985(3) provides in pertinent part:

> If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws;

Supreme Court held that an alleged conspiracy to infringe a claimed First Amendment right to associate with fellow non-union employees is not a violation of § 1985(3) without proof of state involvement, 463 U.S. at 831, 103 S.Ct. at 3357, and, in any event, conspiracies motivated by economic or commercial animus are not within the scope of § 1985(3). 463 U.S. at 839, 103 at 3361.

Appellant seeks to distinguish his case from *Scott* by arguing that the defendants deprived him not of his First Amendment right of association but of his "right to work" pursuant to Texas law. Tex. Rev. Civ. Stat. Ann. art. 5207a. Second, he alleges that the defendants were motivated to conspire against him because he was a "scab" and not solely because he was a nonunion worker.

Following the Supreme Court's analysis, 463 U.S. at 835, 103 S.Ct. at 3359, we need not consider whether the appellant could state a cause of action under § 1985(3) for deprivation of a right under state law because appellant does not satisfy *Griffin's* class-based animus requirement. Section 1985(3) does not cover "conspiracies motivated by bias towards others on account of their *economic* views, status, or activities." *Scott*, 463 U.S. at 838, 103 S.Ct. at 3361 (emphasis in original). The appellant focuses on a very narrow and inconsequential factual difference between his case and *Scott*. The fact that appellant alleges he was discriminated against because he was a "scab" rather than a nonunion worker does not remove him from the stricture of this holding. Essentially, appellant is simply stating that the defendants were biased toward him because of his economic activity, and thus his § 1985(3) claim is without merit.

B. *Section 1985(2)*

Appellant alleges the defendants conspired to obstruct justice in violation of § 1985(2) by submitting false affidavits and testimony to the NLRB and TEC. The first

part of § 1985(2) proscribes conspiracies that interfere with the administration of justice in federal court,[3] and the second part proscribes conspiracies that interfere with the administration of justice in state court.[4] *Kush v. Rutledge*, 460 U.S. 719, 725, 103 S.Ct. 1483, 1487, 75 L.Ed.2d 413 (1983). Appellant fails to state a claim under either part of § 1985(2).

Like § 1985(3), the second part of § 1985(2) is directed at conspiracies to deprive equal protection; the equal protection language in § 1985(2) is paralleled in § 1985(3). Thus, we have held that the *Griffin* race of class-based animus requirement of § 1985(3) also applies to claims under the second part of § 1985(2). *Kimble v. D. J. McDuffy, Inc.*, 648 F.2d 340, 346 (en banc), *cert. denied*, 454 U.S. 1110, 102 S.Ct. 687, 70 L.Ed.2d 651 (1981).[5]

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[3] The first portion of § 1985(2) provides:

> If two or more persons in any State or Territory conspire to deter, by force, intimidation, or threat, any party or witness in any court of the United States from attending such court, or from testifying to any matter pending therein, freely, fully, and truthfully, or to injure such party or witness in his person or property on account of his having so attended or testified, or to influence the verdict, presentment, or indictment of any grand or petit juror in any such court, or to injure such juror in his person or property on account of any verdict, presentment, or indictment lawfully assented to by him, or of his being or having been such juror;

[4] The section portion of § 1985(2) provides:

> [O]r if two or more persons conspire for the purpose of impeding, hindering, obstructing, or defeating, in any manner, the due course of justice in any State or Territory, with intent to deny to any citizen the equal protection of the laws, or to injure him or his property for lawfully enforcing, or attempting to enforce, the right of any person, or class of persons, to the equal protection of the laws;

[5] The Eighth, Ninth, Seventh, Second, Third, and First Circuits have also held that the equal protection language of the second clause of § 1985(2) requires race or class-based animus. *Harrison*

As discussed above, the appellant does not meet the class-based animus requirement so he is foreclosed from stating a claim under the second part of § 1985(2).

Appellant also does not state a claim under the first part of § 1985(2). Although the first part of § 1985(2) does not require race or class-based animus, *Kush v. Rutledge*, 460 U.S. at 727, 103 S.Ct. at 1488, it does require that there have been an interference with the *federal* court system. *Seeley v. Brotherhood of Painters, Decorators & Paper Hangers of America*, 308 F.2d 52, 58 (5th Cir. 1962); *see*, *Kush v. Rutledge*, 460 U.S. 719, 103 S.Ct. 1483, 75 L.Ed.2d 413 (1983). The appellant's allegations of interference with the NLRB and TEC clearly do not fall within the confines of § 1985(2).

C. *Section 1981*

The appellant also contends that the defendants violated § 1981 by discriminating against him because he was a "scab".[6] He argues that § 1981 is not limited to racial discrimination. He relies upon *Guerra v. Manchester Terminal Corp.*, 498 F.2d 641 (5th Cir. 1974)

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v. Springdale Water & Sewer Commission, 780 F.2d 1422, 1430 (8th Cir. 1986); *Bretz v. Kelman*, 773 F.2d 1026, 1030 (9th Cir. 1985); *Williams v. St. Joseph Hospital*, 629 F.2d 448, 451 (7th Cir. 1980); *Dacey v. Dorsey*, 568 F.2d 275, 277 (2d Cir.), *cert. denied*, 436 U.S. 906, 98 S.Ct. 2238, 56 L.Ed.2d 405 (1978); *Brawer v. Horowitz*, 535 F.2d 830, 840 (3d Cir. 1976); *Hahn v. Sargent*, 523 F.2d 461, 469 (1st Cir. 1975), *cert. denied*, 425 U.S. 904, 96 S.Ct. 1495, 47 L.Ed.2d 754 (1976).

[6] Section 1981 provides:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

for the proposition that § 1981 is available to "all persons".

But *Guerra* does not support appellant's claim. *Guerra* held that § 1981 was applicable to aliens. In *Bobo v. ITT, Continental Banking Co.*, 662 F.2d 340 (5th Cir. 1981), *cert. denied*, 456 U.S. 933, 102 S.Ct. 1985, 72 L.Ed.2d 451 (1982), the plaintiff there similarly argued that *Guerra* supported a broad reading of § 1981 to include sex discrimination. We held that § 1981 did not protect against sex discrimination, characterizing *Guerra* as a case with "strong racial overtones." 622 F.2d at 344. As mentioned earlier, the parties had stipulated that there was no racial discrimination issue in this case. In no event can *Guerra* support the proposition that § 1981 protects persons discriminated against on the basis of their economic views.

IV. UNEMPLOYMENT BENEFITS CLAIM

Appellant seeks to bring his claim against the TEC for unemployment benefits in federal court arguing that we have pendent jurisdiction. Even assuming there is pendent jurisdiction, pendent jurisdiction may not override the Eleventh Amendment. *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 104 S.Ct. 900, 919, 70 L.E.2d 67 (1984). The Eleventh Amendment prohibits a private citizen from bringing suit against a state in federal court unless the state consents. *Hans v. Louisiana*, 134 U.S. 1, 10 S.Ct. 504, 33 L.Ed. 842 (1890). The suit against the TEC is a suit against the state since the TEC is an agency of the state of Texas. *Vick v. Texas Employment Commission*, 514 F.2d 734, 737 (5th Cir. 1975). The appellant's claim is thus barred by the Eleventh Amendment unless Texas has waived its sovereign immunity. There is no indication that the state has done so. The Texas unemployment compensation scheme provides for judicial review of the TEC's deci-

sions in its courts.[7] Tex. Rev. Civ. Stat. Ann. art. 5221b-4(i); *see, Ford Motor Co. v. Department of Treasury*, 323 U.S. 459, 465, 65 S.Ct. 347, 351, 89 L.Ed. 389 (1945) (construing statutory language similar to art. 5221b-4(i) as a waiver of immunity from suit in state court only). But as the Supreme Court pointed out in *Pennhurst*, a state's consent to be sued in its own courts does not constitute consent to such a suit in federal court. *Pennhurst*, —— U.S. ——, 104 S.Ct. at 907 n.9. In short, there is nothing to indicate that Texas has waived its immunity from suit in federal court, and the appellant's claim is barred.

V. CONCLUSION

Appellant has undertaken to broaden a routine industrial discharge claim into major constitutional and statutory civil rights claims. He does not allege facts which can substantiate such claims. He may or may not have a breach of contract claim under § 301 not barred by limitation, but only if the collective bargaining agreement under which he worked lacks provision for the exclusiveness of the contract grievance remedy. We remand to the district court to resolve this issue through interpretation of the collective bargaining agreement.

AFFIRMED IN PART, REVERSED IN PART.

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[7] Tex. Rev. Civ. Stat. Ann. art. 5221b-4(i) provides in pertinent part:

> Within ten (10) days after the decision of the Commission has become final, and not before, any party aggrieved thereby may secure judicial review thereof by commencing an action in any court of competent jurisdiction in the county of claimant's residence against the Commission for the review of its decision, in which action any other party to the proceeding before the Commission shall be made a defendant, provided that if a claimant is a non-resident of the State of Texas such action may be filed in a court of competent jurisdiction in Travis County, Texas, or in the county in Texas in which the last employer has his principal place of business, or in the county of claimant's last residence in Texas.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

Civil Action No. B-83-704-CA

AMBROSE DAIGLE

v.

GULF STATES UTILITIES COMPANY, *et al*

[Filed Mar. 19, 1985]

ORDER OF DISMISSAL

For the reasons stated in the memorandum opinion filed simultaneously herewith, it is

ORDERED, ADJUDGED and DECREED that Counts I and II of plaintiff's complaint are hereby DISMISSED. It is further

ORDERED, ADJUDGED and DECREED that plaintiff, Ambrose Daigle, take nothing by his suit against the defendants, Gulf States Utilities Company, Local Union Number 2286, International Brotherhood of Electrical Workers, Larry Wenzell, Jimmy Smith, and Texas Employment Commission, and further

ORDERED that the defendants, Gulf States Utilities Company, Local Union Number 2286, International Brotherhood of Electrical Workers, Jimmy Smith and Larry Wenzell do have and recover their costs of court over

and against plaintiff, for which let execution issue if not promptly paid.

SIGNED this 18 day of March, 1985.

/s/ Earl S. Hines
EARL S. HINES
United States Magistrate

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

Civil Action No. B-83-704-CA

AMBROSE DAIGLE

v.

GULF STATES UTILITIES COMPANY, *et al*

[Filed Mar. 19, 1985]

MEMORANDUM OPINION

The plaintiff, Ambrose Daigle, was discharged from employment with defendant Gulf States Utilities Company (hereinafter "GSU") on October 12, 1982. Plaintiff maintains that his discharge was unlawful. At the time of his discharge, plaintiff was a member of a collective bargaining unit of GSU employees who were represented by defendant International Brotherhood of Electrical Workers Union, Local 2286 (hereinafter "IBEW"). Defendants Larry Wenzell and Jimmy Smith are GSU management employees who held supervisory positions over plaintiff.

In Count I of his complaint, fairly construed, plaintiff alleges (1) a breach of the applicable collective bargaining agreement by GSU and a concomitant breach by IBEW of its implied statutory duty of fair representation, and (2) a conspiracy by all of the foregoing parties defendant to deprive him of his right to work because plaintiff was "not a member of . . . [IBEW] and in 1975

. . . had continued to work while . . . [IBEW] was on strike against . . . [GSU]." He alleges that because he did not choose to affiliate with IBEW, or participate in its activities, he became the focal point of harassment by IBEW members and former IBEW members who had become members of GSU management. Further, he alleges that the animus against him by such persons caused his discharge and his failure to obtain any relief under the grievance and arbitration machinery of the collective bargaining agreement.

Plaintiff states that federal jurisdiction over these matters is present by virtue of Section 301 of the Labor-Management Relations Act of 1947, 29 U.S.C. § 185, and "Title 42 U.S.C. Section 1981 et seq". Plaintiff's first claim under Count I will hereinafter sometimes be called "the Section 301/DFR claim", and the second group of claims under Count 1 will hereinafter sometimes be called "the Civil Rights claims".

In Count II of his complaint, plaintiff has brought suit against GSU and the Texas Employment Commission (hereinafter "TEC"), seeking judicial review under Tex. Rev. Civ. Stat. Ann. art. 5221b-4(i) of the TEC's decision denying his claim for unemployment benefits.

On December 4-5, 1984, all defendants under both counts of the complaint filed motions to dismiss. Defendants, GSU and IBEW, based their motions on on the pleadings. See Fed. R. Civ. P. 12(c). Defendant, TEC, based its motion on lack of subject matter jurisdiction. See Fed. R. Civ. P. 12(b)(1).

In accordance with the provisions of 28 U.S.C. § 636 (c), all parties consented to the conduct of all further proceedings in the case before a United States Magistrate. On December 10, 1984, the undersigned was designated to exercise such function by the Honorable United States District Judge Joe J. Fisher.

A hearing on the motions to dismiss was held on January 3, 1985. The parties were given an additional two weeks from such date, until January 17, 1985, within which to supplement their positions.

I have considered the complaint and answers, the motions to dismiss, the response and supplemental response thereto, and the memoranda of authorities filed by all parties. For the reasons stated hereafter, each count of plaintiff's complaint will be dismissed.

Count I

A. *The Section 301/DFR Claim.*

It is clear that "[u]nder section 301 of the Labor-Management Relations Act of 1947 . . ., 29 U.S.C. § 185 . . ., an employee may bring an action charging his employer with breach of a collective bargaining agreement, and his union with violating its duty of fair representation in mishandling the ensuing grievance". *Edwards v. Sea-Land Service, Inc.*, 720 F.2d 857, 858 (5 Cir. 1983), *citing Vaca v. Sipes*, 386 U.S. 171, 186-187, 87 S.Ct. 903, 914-15, 17 L.Ed.2d 842 (1967), and *Hines v. Anchor Motor Freight*, 424 U.S. 554, 567, 96 S.Ct. 1048, 1058, 47 L.Ed.2d 231 (1976). However, such suits must be brought within six months of the date on which the cause of action accrues. *DelCostello v. International Broth. of Teamsters*, 103 S.Ct. 2281, 2294 (1983).

In the present case, plaintiff alleges that on November 19, 1982, IBEW refused to file a grievance and seek arbitration on his behalf.[1] It was on such date that plaintiff's cause ot action against GSU and IBEW accrued. This suit was filed on August 8, 1983, approximately nine

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[1] At the hearing on January 3, 1985, the parties stipulated that the IBEW decision was communicated to plaintiff by letter on or about such date.

months later. Therefore, under the *DelCostello* holding, this suit was time-barred when filed.[2]

Plaintiff argues that this case is factually different from the *DelCostello* case; that the *DelCostello* rule should not be applied retroactively to this case;[3] and that in any event the six-month limitations period applicable to this type suit was tolled in this case by an NLRB unfair labor practice proceeding filed by plaintiff. With respect to plaintiff's first argument, I find that any factual dissimilarities between this case and the *DelCostello* case do not mandate a different result. Plaintiff alleges that IBEW inadequately represented him and did not even invoke the grievance and arbitration machinery of the collective bargaining agreement. In this case, for the purpose of determining the date on which plaintiff's causes of action arose, it would appear largely immaterial that no grievance was filed or arbitration had. On November 19, 1983, IBEW refused to proceed further, and that is when plaintiff knew or should have known that union representation, fair or unfair, adequate or inadequate, had ceased altogether.[4] *See Metz v. Tootsie Roll Industries*, 715 F.2d 299, 303-06 (7 Cir. 1983) *cert, denied*, —— U.S. ——, 104 S.Ct. 976, (1984).

With respect to the second argument, I find that the *DelCostello* rule is to be applied retroactively, and that such rule is properly applicable to this case. *See e.g., Edwards v. Sea-Land Service, Inc.*, 720 F.2d 857, 862-63 (5 Cir. 1983). *See also Gray v. Amalgamated Meat Cut-*

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[2] I express no opinion whatsoever on the merit or lack thereof of such causes of action.

[3] *DelCostello* was decided on June 8, 1983; plaintiff's suit was filed two months thereafter on August 8, 1983. Accordingly, there is a serious question as to whether retroactivity of the *DelCostello* rule should be considered a factor in this case. Nevertheless, the issue will be addressed herein.

[4] *See* footnote 1, *supra*.

ters Local 540, 736 F.2d 1055 (5 Cir. 1984) (rejecting argument that *Edwards*, *supra*, established that the retroactivity of *DelCostello* is to be determined on a case-by-case basis and holding that *DelCostello* "is to be applied retroactively to all cases in our circuit").

With respect to the third argument, I find that nothing alleged herein suggests that tolling principles should be applied. It is true that following his discharge plaintiff elected to file an NLRB unfair labor practice charge against the union and the company and this was pending for some time before the board dismissed it. However, this Court is not in the position to create an exception to the *DelCostello* rule, keyed to the vagaries and variables of time consumed by NLRB proceedings, which can stretch from a few weeks to a few years. A contrary holding would, in effect, suspend operation of the *DelCostello* rule until board proceedings were exhausted, and would be contrary to the principle of uniformity which caused adoption of the *DelCostello* rule in the first place. On this point, *Weed v. East Texas Motor Freight Lines, Inc.*, 592 F. Supp. 713, 719 (N.D. Tex. 1983), is persuasive. There, the court dismissed a similar attempt to toll the *DelCostello* rule.

Inasmuch as plaintiff's complaint was filed on August 8, 1983, a date approximately nine months after IBEW refused to persue his case further, I find that plaintiff's suit against GSU and IBEW for breach of contract and duty of fair representation is untimely and must be dismissed.[5]

B. *The Civil Rights Claims.*

In addition to the Section 301/DFR claim, Count I of plaintiff's complaint also asserts federal jurisdiction under "Title 42 U.S.C. § 1981 et. seq.". However, it would appear from subsequent pleadings that the only

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[5] *See* footnote 1, *supra*.

statutes in this sequence truly at issue are 42 U.S.C. § 1981, derived in part from the Civil Rights Act of 1866, and 48 U.S.C. § 1985, derived from the Ku Klux Klan Act of 1871.[6]

(i) *Section 1981*

Plaintiff argues that his cause of action is maintainable under 42 U.S.C. § 1981. However, plaintiff has not alleged that racial discrimination plays any part in this case.[7] Section 1981 provides as follows:

> "All persons within the jurisdiction of the United States shall have the same right in every state and territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property *as is enjoyed by white citizens*, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other."
>
> 42 U.S.C. § 1981 (emphasis added).

While, technically speaking, it may be overbroad to state that Section 1981 is *strictly* limited to cases involving "racial discrimination",[8] plaintiff has not cited any

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[6] Plaintiff's response to defendants' motions to dismiss at 1-13, plaintiff's supplemental response to defendants' motion to dismiss at 2. At any rate, it would appear that no facts alleged by plaintiff could bring this case under 42 U.S.C. § 1982 (property conveyances); 42 U.S.C. § 1983 (requiring state action); or 42 U.S.C. § 1984 (repealed) (which related to review of proceedings by the Supreme Court).

[7] At the hearing on January 3, 1985, the parties stipulated that "racial discrimination plays no part in this case".

[8] *But see Scott v. Moore*, 461 F. Supp. 224, 229 (E.D. Tex. 1978) *rev'd, on other grounds sub nom. United Broth. of Carpenters & Joiners v. Scott*, —— U.S. ——, 103 S.Ct. 3352 (1983) (stating, in dictum, that Section 1981 has "not been extended to non-racial discrimination"); *Scott v. Moore*, 640 F.2d 708, 719 (5 Cir. 1981)

authority, and I have found none, standing for the proposition that Section 1981 was intended to afford protection for those persons who are allegedly deprived of the right to work solely on the basis of their economic views and activities. Indeed, the only areas in which Section 1981 has been interpreted to reach further than "racial discrimination" appear to be nonetheless linked to skin color [9] or citizenship.[10]

On the other hand, it is generally recognized that Section 1981 is not directed toward such dissimilar things as sex or religious discrimination.[11] The cited cases are replete with lengthy discussions on the underlying history and purpose of the original statutes from which Section 1981 is devolved. In light of such history and purpose, and in light of the cited cases, I find that plaintiff cannot state a cognizable claim under Section 1981, and that portion of the Complaint should be dismissed.

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rev'd, sub nom. United Broth. of Carpenters & Joiners v. Scott, —— U.S. ——, 103 S.Ct. 3352 (1983) (stating, in dictum, that "the courts have consistently limited [Section 1981's] application to instances of racial discrimination"); and *Thomas v. Firestone Tire and Rubber Company*, 392 F. Supp. 373, 375-76 (N.D. Tex. 1975) (stating that "It is the Court's opinion that only actions founded on racial discrimination may be maintained under [Section 1981] . . .").

[9] *See e.g. McDonald v. Santa Fe Trail Transportation Co.*, 427 U.S. 273, 287-288, 96 S.Ct. 2574, 2582 (1976) (Section 1981 covers reverse "racial" discrimination against white persons); *Gonzalez v. Stanford Applied Eng'r, Inc.*, 597 F.2d 1298, 1300 (9 Cir. 1979) (". . . prejudice towards those of Mexican descent having a skin color not characteristically caucasian must be said to be racial prejudice under § 1981").

[10] *See e.g. Graham v. Richardson*, 403 U.S. 365, 378, 91 S.Ct. 1848, 1855 (1971) (indicating that Section 1981 applies to discrimination on the basis of alienage).

[11] *See e.g. Runyon v. McCrary*, 427 U.S. 160, 168, 96 S.Ct. 2586, 2593 (1976) (indicating, in dictum, that Section 1981 does not apply to discrimination based on sex or religion).

(ii) *Section 1985*

Plaintiff alleges that defendants "single [him] out", and conspired to take his job because he declined to affiliate with IBEW, and exercised his right to work by crossing an IBEW picket line. He argues that "the historical background of the Beaumont, Texas area has been one of strong unionism", and that he was "one of the few individuals who chose to exercise the statutory right to work".

In my opinion, plaintiff has not stated facts that would avoid the force of the Supreme Court's holding in *United Broth. of Carpenters & Joiners v. Scott*, —— U.S. ——, 103 S.Ct. 3352 (1983). The *Scott* litigation concerned an attack on a "non-union" construction site near Port Arthur, Texas. The construction company and two of its employees alleged that the attack was the result of a "conspiracy" to prevent them from working in the southeast Texas area, and was orchestrated by a trades council, its unions and individual union members, who resented the fact that "non-union" labor was being performed in the area. The Supreme Court did not disagree with findings by the lower courts that a conspiracy had taken place, and that the construction company and its employees had been injured as a result. However, the Court held that a conspiracy of the type before it, one based on animus by trade unions against a "non-union" company, was not cognizable under 42 U.S.C. § 1985(3), reasoning as follows:

> ". . . [I]t is a close question whether § 1985(3) was intended to reach any class-based animus other than animus against Negroes and those who championed their cause, most notably Republicans. The central theme of the bill's proponents was that the Klan and others were forcibly resisting efforts to emancipate Negroes and give them equal access to political power. The predominate purpose of

§ 1985(3) was to combat the prevalent animus against Negroes and their supporters. The latter included Republicans generally, as well as others, such as Northerners who came South with sympathetic views towards the Negro. Although we have examined with some care the legislative history that has been marshalled in support of the position that Congress meant to forbid wholly non-racial, but politically motivated conspiracies, we find difficult the question whether § 1985(3) provided a remedy for every concerted effort by one political group to nullify the influence of or do other injury to a competing group by use of otherwise unlawful means.

* * *

Even if the section must be construed to reach conspiracies aimed at any class or organization on account of its political views or activities, . . ., we find no convincing support in the legislative history for the proposition that the provision was intended to reach conspiracies motivated by bias towards others on account of their *economic* views, status, or activities. Such a construction would extend § 1985(3) into the economic life of the country in a way that we doubt that the 1871 Congress would have intended when it passed the provision in 1871".

Plaintiff has suggested nothing more than that he was a victim of conspiracy to harass him and to deprive him of the right to work because he declined to affiliate with IBEW or participate in its activities.[12] According to *Scott*, supra, a conspiracy of this type is not cognizable under 42 U.S.C. § 1985(3).

Plaintiff also makes reference to a possible cause of action for "obstruction of justice" by defendants, alleg-

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[12] Plaintiff has not alleged that such conspiracy was racially motivated in any respect. *See* footnote 7, *supra*.

ing that they gave false and misleading affidavit testimony to the NLRB and to the TEC.[13] Such contention requires an examination of Section 1985(2). In *Kimble v. D. J. McDuffy, Inc.*, 623 F.2d 1060 (5 Cir. 1980) aff'd 648 F.2d 340 (5 Cir. 1981) (*en banc*), the court wrote as follows:

> "A careful analysis of the various provisions of Section 1985(2) and an application of the facts to those provisions is required in order to resolve this question. In conducting this examination, we must approach the 'perfidious syntax' of Section 1985(2) with some care. *Brawer*, 535 F.2d at 837. The statute contains several different provisions, no two of which are directed at the same type of conspiracy. As the district court noted, when one omits the clauses in Section 1985(2) that are applicable to juries and jurors (and inapplicable in the case at bar), subsection 2 contains four clauses that create four distinct causes of action:
>
> A. If two or more persons conspire to deter, by force, intimidation or threat, any party or witness in any court of the United States from attending such court, or from testifying to any matter pending therein . . . or
>
> B. to injure such party or witness in his person or property on account of his having so attended or testified, or
>
> C. if two or more persons conspire for the purpose of impeding, hindering, obstructing, or defeating, in any manner, the due course of justice in any State or Territory, with intent to deny any citizen the equal protection of the laws, or

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[13] The TEC is not a party to Count I of plaintiff's complaint.

> D. to injure him or his property for . . . the right of any person, or class of persons, to the equal protection of the laws."

623 F.2d at 1065, *citing* 445 F. Supp. at 274. Under the plain language of the statute, the first two clauses concern proceedings in federal *court*. It has been held specifically that such language does not apply to proceedings before federal administrative tribunals. *Kimble v. D. J. McDuffy, Inc.*, 623 F.2d 1060, 1069-70 (5 Cir. 1980), *rev'd in part on different grounds;* 648 F.2d 340, 347-48 (5 Cir. 1981) (*en banc*). False or misleading affidavits, if any, given by defendants to the NLRB, would not be considered tantamount to the obstruction of proceedings in federal "court" within the meaning of the first two clauses of Section 1985(2).

The second two clauses of Section 1985(2) concern obstruction of justice in any state. However, under each clause, for an actionable conspiracy to exist there must be a deprivation of "the equal protection of the laws". Such language in a different part of the same statute has been held to require "racial or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action". *Griffin v. Breckenridge*, 403 U.S. 88, 103, (1971). Plaintiff has not alleged a "racial or perhaps otherwise class-based, invidiously discriminatory animus" behind the defendants' actions, cognizable under the second two clauses of Section 1985(2), inasmuch as he only alleges that he was a victim of conspiracy based on his economic views. *See United Broth. of Carpenters & Joiners v. Scott*, —— U.S. ——, 103 S.Ct. 3352, 3360-61 (1983). False and misleading statements, if any, given by defendants to the TEC, would not constitute unlawful conduct under the second two clauses of Section 1985(2), and plaintiff's claim in such regard should be dismissed.[14]

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[14] *See* footnote 7, *supra*.

Count II

In Count II of his complaint, plaintiff asks the Court to accept pendent jurisdiction of a statutory appeal of the denial of unemployment benefits to him by TEC. Appeals for judicial review of TEC decisions are provided for by Tex. Rev. Civ. Stat. Ann. art. 5221b-4(i) in the form of suit in the state district court.

Suit in federal court against the TEC in a statutory appeal from its decision regarding unemployment benefits is barred by the Eleventh Amendment to the United States Constitution. *See Kitchens v. Texas Dept. of Human Resources*, 747 F.2d 985, 986 (5 Cir: 1984). In such proceedings, the State of Texas is more than a nominal party defendant; the TEC and the employer are both necessary parties. *Lambeth v. Texas Unemployment Compensation Comm'n*, 362 S.W.2d 205, 206 (Tex. Civ. App.—Waco, 1962, writ ref'd). Alternatively, with the dismissal of asserted federal claims expressed in Count I, it would be inappropriate to entertain a suit based solely upon this state law statutory proceeding, and I, in the exercise of discretion, decline to do so.

Accordingly, I find it necessary to dismiss Counts I and II of plaintiff's complaint.[15] An order accomplishing the dismissal accompanies this memorandum.

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[15] Insofar as defendants IBEW and GSU are concerned, dismissal is pursuant to Fed. R. Civ. P. 12(c) which provides in part:

> ". . . If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56."

In the foregoing memorandum opinion, references have been in footnotes 1 and 7 to stipulations made by the parties at the hearing on January 3, 1985. Such stipulations involve matters outside of the pleadings. Consideration of the stipulations has been unnecessary in order to reach a decision to dismiss the Section 301/DFR

SIGNED this 18 day of March, 1985.

/s/ Earl S. Hines
EARL S. HINES
United States Magistrate

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and civil rights claims under Count I of the complaint. However, if it should be determined that it would constitute error to dismiss these claims without such stipulations, the stipulations have been noted, and consideration of them leads me to conclude that defendants GSU and IBEW are entitled, alternatively, to summary judgment.

By entering into the stipulations, the parties themselves changed the nature of these proceedings, plaintiff was put on notice of the change, and in any event plaintiff was given an additional period of two weeks within which to supplement his response, and although he could have, he did not file any additional evidentiary materials, and he did not offer any explanation as to why he could not have done so. Thus, plaintiff has waived any procedural objection to such alternative holding.

The order which accompanies this memorandum opinion shall be deemed an order for summary judgment if it is determined that dismissal on the pleadings alone was erroneous.

APPENDIX B

STATUTES INVOLVED

42 USCA 1981 Equal rights under the law

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

42 USCA 1985 (2)(3) Conspiracy to interfere with civil rights

Obstructing justice; intimidating party, witness, or juror

(2) If two or more persons in any State or Territory conspire to deter, by force, intimidation, or threat, any party or witness in any court of the United States from attending such court, or from testifying to any matter pending therein, freely, fully, and truthfully, or to injure such party or witness in his person or property on account of his having so attended or testified, or to influence the verdict, presentment, or indictment of any grand or petit juror in any such court, or to injure such juror in his person or property on account of any verdict, presentment, or indictment lawfully assented to by him, or of his being or having been such juror; or if two or more persons conspire for the purpose of impeding, hindering, obstructing, or defeating, in any manner, the due course of justice in any State of Territory, with intent to deny to any citizen the equal protection of the laws, or to injure him or his property for lawfully enforcing, or attempting to enforce, the right of any person, or class of persons, to the equal protection of the laws;

Depriving persons of rights or privileges

(3) If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person of class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

29 USCA 157 Right of employees as to organization, collective bargaining, etc.

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities except to the extent that such right

may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a) (3) of this title.

29 USCA 160 (b) Prevention of unfair labor practices—Powers of Board generally

Complaint and notice of hearing; answer; court rules of evidence applicable

(b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member hereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: Provided, That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge by reason of service in the armed forces, in which event the six-month period shall be computed from the day of his discharge. Any such complaint may be amended by the member, agent or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon. The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the member, agent, or agency conducting the hearing or the Board, any other person may be allowed to intervene in the said proceeding and to present testimony. Any such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts

of the United States, adopted by the Supreme Court of the United States pursuant to section 2072 of Title 28.

Vernon's Ann. Civ. St. Art 5154d Section 2

Picketing

Section 2. It shall be unlawful for any person, singly or in concert with others, by use of insulting, threatening or obscene language, to interfere with, hinder, obstruct, or intimidate, or seek to interfere with, hinder, obstruct, or intimidate, another in the exercise of his lawful right to work, or to enter upon the performance of any lawful vocation, or from freely entering or leaving any premises.

Vernon's Ann. Civ. St. Art 5207a Section 1

Right to bargain freely not to be denied; membership in labor union

Section 1. The inherent right of a person to work and bargain freely with his employer, individually or collectively, for terms and conditions of his employment shall not be denied or infringed by law, or by any organization of whatever nature.

Vernon's Ann. Civ. St. Art 5526 Section 4

Actions to be commenced within two years

Section 4. Actions for debt where the indebtedness is not evidenced by a contract in writing.

Vernon's Ann. Civ. St. Art 5527 Section 1

What actions barred in four years

Section 1. Actions for debt where the indebtedness is evidenced by or founded upon any contract in writing.

Vernon's Ann. Civ. St. Art 5529

All other actions barred, when

Every action other than for the recovery of real estate, for which no limitation is otherwise prescribed, shall be brought within four years next after the right to bring the same shall have accrued and not afterward.